FILED
JUL 22 2002
OFFICE OF THE CLERK

(10) (10)

Nos. 01-705 and 01-715

In the Supreme Court of the United States

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

MICHAEL H. HOLLAND, ET AL., PETITIONERS

v.

BELLAIRE CORPORATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

25 pp

TABLE OF CONTENTS

Page

1. Congress's use of "shall" and a particular date does not mean that Coal Act assignments made on or after October 1, 1993, are void 4
2. Respondents' argument that Congress intended the Commissioner to abandon all attempts to make assignments as of October 1, 1993, is at odds with the basic purposes of the Coal Act 10
3. The Coal Act does not provide that the consequence of SSA's failure to complete the assignment process before October 1, 1993, is that all remaining miners shall be deemed unassigned 16

TABLE OF AUTHORITIES

Cases:

Alabama v. *Bozeman*, 533 U.S. 146 (2001) 9
Anderson v. *Yungkau*, 329 U.S. 482 (1947) 9
Apogee Coal Co. v. *Holland*, No. 01-13691, 2002 WL 1491641 (11th Cir. July 12, 2002) 19
Barnhart v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002) 10
Brock v. *Pierce County*, 476 U.S. 253 (1986) 2, 6, 7, 8, 9, 10, 16, 17
Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) .....
Escoe v. *Zerbst*, 295 U.S. 490 (1935) 8
Hallstrom v. *Tillamook County*, 493 U.S. 20 (1989) 9
Holland v. *Pardee Coal Co.*, 269 F.2d 424 (4th Cir. 2001), petition for cert. pending, No. 01-1366 (filed Mar. 14, 2002) 2-3, 14, 18
Mohasco Corp. v. *Silver*, 447 U.S. 807 (1980) 8
Regions Hosp. v. *Shalala*, 522 U.S. 448 (1998) 7, 19
Republic Nat'l Bank v. *United States*, 506 U.S. 80 (1993) 14

Cases—Continued: Page

St. Regis Mohawk Tribe v. *Brock*, 769 F.2d 37 (2d Cir. 1985), cert. denied, 476 U.S. 1140 (1986) 2
United States v. *Boyle*, 469 U.S. 241 (1985) 9
United States v. *Hoar*, 26 F. Cas. 329 (C.C.D. Mass. 1821) (No. 15,373) 7
United States v. *James Daniel Good Real Prop.*, 510 U.S. 43 (1993) 6, 7, 18
United States v. *Locke*, 417 U.S. 84 (1985) 9
United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 3, 7
United States v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120 (1886) 7
Wheeling-Pittsburgh Steel Corp. v. *Barnhart*, No. 5:99CV60 (N.D. W.Va. Mar. 29, 2002) 19

Constitution, statutes, and rule:

U.S. Const.:
Amend. XII 9
Amend. XX 9
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 17
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701-9722 1
26 U.S.C. 9702(a)(2) 5
26 U.S.C. 9704(g)(1) 6
26 U.S.C. 9704(h) 5
26 U.S.C. 9705(a) 5
26 U.S.C. 9706(a) 6, 7, 17, 19
26 U.S.C. 9706(b) 13
26 U.S.C. 9706(f)(1) 20
26 U.S.C. 9706(f)(3)(A)(ii) 18
Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Tit. V, § 501, 113 Stat. 1501A-214 13
Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, Tit. VII, § 701(a), 114 Stat. 1024 13

Statutes and rule—Continued: Page

Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037 2
30 U.S.C. 1231(a) 14
30 U.S.C. 1231(b) 14
30 U.S.C. 1231(c)(1) 14
30 U.S.C. 1231(e) 15
30 U.S.C. 1232(a) 13, 14
30 U.S.C. 1232(h) 13
Fed. R. Civ. P. 25(a) 9

Miscellaneous:

Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Oversight of Government, Management, Restructuring, and the District of Columbia of the Senate Comm. on Governmental Affairs, 105th Cong., 2d Sess. (1998) 4
Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance, 102d Cong., 1st Sess. (1991) 12, 15
138 Cong. Rec. (1992):
p. 34,001 ..... 11, 15
p. 34,002 11
p. 34,006 14
p. 34,007 15
p. 34,032 ..... 11, 15
Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations For 1994: Hearings Before a Subcomm. of the House Comm. on Appropriations, 103d Cong., 1st Sess., Pt. 2 (1993) 3-4
General Accounting Office:
Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund (Aug. 15, 2000) 13
Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue (Apr. 2002) 13

Miscellaneous—Continued: Page

H.R. Conf. Rep. No. 461, 102d Cong., 2d Sess. (1992) 15
H.R. Conf. Rep. No. 914, 106th Cong., 2d Sess. (2000) 13
Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means, 103d Cong., 1st Sess. (1993) 4
Staff of House Comm. on Ways and Means, 104th Cong., 1st Sess., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992* (Comm. Print 1995) 4

In the Supreme Court of the United States

No. 01-705

JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY, PETITIONER

v.

PEABODY COAL COMPANY, ET AL.

No. 01-715

MICHAEL H. HOLLAND, ET AL., PETITIONERS

v.

BELLAIRE CORPORATION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONER

Respondents contend that Congress intended to divest the Commissioner of Social Security of jurisdiction to make any assignments of retired miners to coal operators under the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701-9722, on or after October 1, 1993, and that all such assignments must now be held to be void.

That is so, in respondents' view, even though the result would be that thousands of retired miners who would otherwise be properly assigned to respondents and other operators under the criteria specified in the Coal Act would instead be incorrectly and permanently treated as unassigned; even though respondents and other operators similarly (and fortuitously) situated would thereby avoid responsibility for the health-care benefits of retired miners whom they had actually employed, as well as those miners' spouses and dependents; and even though those health-care costs would become the responsibility of the government or of other coal operators that had never employed the miners concerned or had any affiliation with any operator that had ever employed them. As this Court observed in *Brock* v. *Pierce County*, 476 U.S. 253 (1986), where it rejected a similar contention, the proposition that Congress intended such consequences "is not, to say the least, of the sort that commands instant assent." *Id.* at 258 (quoting *St. Regis Mohawk Tribe* v. *Brock*, 769 F.2d 37, 41 (2d Cir. 1985) (Friendly, J.), cert. denied, 476 U.S. 1140 (1986)).

In fact, respondents' description of the Coal Act would be unrecognizable to the Congress that enacted that statute. Congress's stated purposes, set forth in the text of the Coal Act itself, were to "identify persons *most responsible* for plan liabilities" and to "provide for the continuation of a *privately financed self-sufficient program* for the delivery of health care benefits" to retired miners. See Energy Policy Act of 1992, Pub. L. No. 102-486, Tit. XIX, § 19142, 106 Stat. 3037 (emphasis added). As the Fourth Circuit has explained, Congress reacted to the impending collapse of the predecessor health-care trusts—caused largely by coal operators foisting responsibility for their own retirees onto unrelated operators—by grounding the Coal Act in a "pay for your own" principle. See *Holland* v. *Pardee Coal Co.*, 269 F.3d 424, 428 (2001), petition for cert. pending, No. 01-

1366 (filed Mar. 14, 2002). Given Congress's painstaking efforts to avoid a recurrence of the downward spiral of the predecessor trusts, Congress could hardly have intended to require that, if the Social Security Administration (SSA) was unable to complete the massive assignment process by October 1, 1993, the Commissioner should simply abandon the task and throw all remaining miners irretrievably into the unassigned pool. Congress did not intend to "bestow" such a "windfall," *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 720 (1990), on the operators whose former employees happened to be among those who remained to be assigned as of October 1, 1993.

The circumstances surrounding the implementation of the Coal Act make it all the more unlikely that Congress intended to require SSA to abandon the entire assignment process on October 1, 1993. The Coal Act required the Commissioner to assign 65,000 retired miners to the proper operators according to the detailed criteria set forth in the Act—a task that required manually sorting thousands of earnings records to determine each miner's employment history and reviewing hundreds of corporate transactions to determine whether entities were "related persons" of companies that had employed miners. See Gov't Br. 8-10. SSA informed Congress when it sought a supplemental appropriation to fund SSA's costs of making those assignments that the process might not be completed by October 1, 1993. Congress did not enact that supplemental appropriation until July 2, 1993, only three months before October 1, 1993. See *id.* at 8-9.[1]

---

[1] Respondents ignore the fact that when an SSA official informed Congress that an additional appropriation was necessary for the agency to carry out the assignment process, he specifically told Congress that the process *could not be completed* before October 1, 1993. See Gov't Br. 36-37; *Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations For 1994: Hearings Before a Subcomm.*

1. Congress's Use Of "Shall" And A Particular Date Does Not Mean That Coal Act Assignments Made On Or After October 1, 1993, Are Void

Respondents lay great stress on the fact that Congress used a mandatory word—"shall"—in directing the Commissioner to complete the assignment process by October 1, 1993. See Peabody Br. 21-23; Bellaire Br. 17-19. But the issue in this case is not whether Congress intended, when it enacted the Coal Act, to require the Commissioner to complete the assignment process for each beneficiary before October 1, 1993. Rather, the pertinent question is what

---

of the House Comm. on Appropriations, 103d Cong., 1st Sess. Pt. 2, at 158-159 (1993). Later in the year, after the necessary appropriation had been enacted into law, SSA expressed greater optimism that the agency could complete the process in time, but it did not give Congress a guarantee of timely completion; rather, the Acting Commissioner stated: "You understand, we are trying to assign 65,000 miners in two months, and I think we will make it." *Provisions Relating to the Health Benefits of Retired Coal Miners: Hearing Before the House Comm. on Ways and Means*, 103d Cong., 1st Sess. 40 (1993). As respondents point out (Peabody Br. 40 n.25; Bellaire Br. 43), two years later, the same SSA official told the House Ways and Means Committee that SSA had successfully completed the initial assignment process by October 1, 1993. See also *Agency Management of the Implementation of the Coal Act: Hearing Before the Subcomm. on Oversight of Government Management, Restructuring, and the District of Columbia of the Senate Comm. on Governmental Affairs*, 105th Cong., 2d Sess. 19 (1998) (similar testimony of Marilyn O'Connell, Associate Commissioner of SSA). While those statements were incorrect, SSA did *not* tell Congress that it lacked the *power* to make any assignments on or after October 1, 1993. In addition, on the same date in 1995 that the SSA official told the Ways and Means Committee that the assignment process had been completed before October 1, 1993, the staff of that committee published a report making clear that SSA had not yet completed the entire initial assignment process. See Staff of House Comm. on Ways and Means, 104th Cong., 1st Sess., *Development and Implementation of the Coal Industry Retiree Health Benefit Act of 1992*, at 30 (Comm. Print 1995).

Congress intended the Commissioner to do if, contrary to Congress's expectation when the Coal Act became law, the Commissioner was unable to make a proper assignment of a miner before that date. Would Congress have intended the Commissioner to make an assignment in compliance with the statutory criteria, albeit after the date by which such assignments were to be made, or (as respondents argue) would Congress have intended the Commissioner to throw up her hands and treat all such miners as unassigned, knowing that such treatment was incorrect under the statute? That question cannot be answered simply by pointing to the fact that Congress used the word "shall" and a particular date in the Coal Act.

Indeed, there are several other places in the Act where Congress, using the word "shall," required that an event occur by a certain date, and yet no one would contend that Congress prohibited the event from taking place after that date. For example, in 26 U.S.C. 9702(a)(2), Congress directed that the predecessor health-care trusts "shall" be merged into the new UMWA Combined Benefit Fund (Combined Fund) "[a]s of February 1, 1993." Yet it is unimaginable that, if for some reason, the predecessor trusts were unable to effectuate the merger by that date, Congress would have intended that the new Combined Fund should never have come into existence. Similarly, in 26 U.S.C. 9705(a), Congress required that the 1950 UMWA Pension Plan "shall" transfer $210 million to the Combined Fund in three separate tranches "on" three specific dates. But it is inconceivable that, if for some reason, a transfer could not have been made "on" (or before) the specified date, Congress would have intended that the transfer should never occur. And while Congress provided in 26 U.S.C. 9704(h) that the trustees of the Combined Fund "shall, not later than 60 days after the enactment date," furnish SSA information about benefits, covered beneficiaries, and other matters necessary

to enable SSA to compute premiums due from operators, Congress surely did not intend to divest the trustees of their authority (or excuse their duty) to furnish such information to SSA after that date.

The foregoing provisions were designed to spur the trustees of the predecessor trusts and the Combined Fund into taking the steps necessary to ensure that the Combined Fund would be up and running by the dates specified in the Act, and into conveying information to SSA to assist the agency in doing its part to ensure that the funds necessary to support the payment of health-care benefits would be expeditiously secured from the operators that the Act makes responsible. In furtherance of that same overarching goal, Congress provided in 26 U.S.C. 9706(a) that SSA in turn "shall" assign each miner to a particular operator before October 1, 1993, to ensure that the Combined Fund would actually receive premiums from the responsible operators expeditiously at the beginning of the first fiscal year in which the Combined Fund was to be supported by such premiums. See 26 U.S.C. 9704(g)(1); Gov't Br. 8 & n.5.

"It would make little sense to interpret directives designed to ensure the expeditious collection of revenues [from operators] in a way that renders the [Combined Fund] unable, in certain circumstances, to obtain [those] revenues at all." *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 65 (1993). By the same token, "[c]onspicuously absent" from the text or legislative history of the Coal Act "is any reference to the possibility that the [October 1, 1993] provision might convey rights upon the [operators]." *Pierce County*, 476 U.S. at 264. For these reasons, the October 1, 1993, date "was clearly intended to spur the [Commissioner] to action, not to limit the scope of [her] authority." *Id.* at 265.

This Court has recognized in a series of cases that statutory dates established to spur governmental action should

not be read to produce counterintuitive results, and accordingly has held that Congress's direction that a government official "shall" perform a function within a particular period is not sufficient to divest the official of jurisdiction to act after that date. *Pierce County*, 476 U.S. at 259-260; *Montalvo-Murillo*, 495 U.S. at 717-718; *James Daniel Good*, 510 U.S. at 63-64; see *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 459 (1998). As this Court explained in *Pierce County*, that rule is but a particular application of the general and "frequently articulated * * * great principle of public policy * * * which forbids that the public interest should be prejudiced by the negligence"—or, *a fortiori*, by the practical inability—"of the officers or agents to whose care they are confided." 476 U.S. at 260 (quoting *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)) (internal quotation marks omitted).[2]

This Court had already decided *Pierce County* and *Montalvo-Murillo* at the time Congress passed the Coal Act. Congress is therefore presumed to have intended that the requirement in Section 9706(a) that SSA "shall, before October 1, 1993," assign each miner to the responsible operator would not divest SSA of jurisdiction to act after that date—just as specific dates in other provisions of the Act for completion of other tasks by private trustees did not divest the trustees of their authority to act after those dates. See pp. 5-6, *supra*. Certainly, no one in Congress or SSA

---

[2] As shown by the Court's citation to the decision in *Nashville, Chattanooga & St. Louis Railway*, that "great principle" also finds expression in the rule that the government is presumptively not bound by general statutes of limitations or the doctrine of laches. As Justice Story explained the basis for that rule, "the king is always busied for the public good," and therefore may not be in a position "to assert his right within the times limited to subjects." *United States* v. *Hoar*, 26 F. Cas. 329, 330 (C.C.D. Mass. 1821) (No. 15,373).

acted as if the October 1, 1993, date had the remarkable consequences that respondents attribute to it.

The cases cited by respondents (Peabody Br. 21-22; Bellaire Br. 20) for the proposition that Congress intends mandatory language to be obeyed are not to the contrary. The question in this case is not whether Congress intends mandatory language to be obeyed, but the analytically distinct question whether Congress intended to divest an agency official of all authority to act (or to excuse her from a duty to act) if she was unable to complete action by a specified date. The great majority of the cases cited by respondents did not involve the inability of government agencies to meet time limits, and thus did not present the question whether an agency loses power to act if it fails to do so. For the same reason, those cases also did not implicate the special concern, noted above, that the inability of the government's agents to act within a specified time should not deprive government of the power to act in the public interest. See *Pierce County*, 476 U.S. at 261 (distinguishing *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), cited by Bellaire (Br. 20), on that ground).[3]

---

[3] Even the decisions cited by respondents that hold that government agents must act according to mandatory language setting time limits do not establish that, in the absence of express language so providing, government agencies lose the *power* to act according to Congress's instructions if those time limits are not met. Thus, in *Escoe* v. *Zerbst*, 295 U.S. 490 (1935), the Court ordered the release of an offender on probation who had been arrested on a revocation warrant where the government had not followed the statutory requirement that such a probationer "shall forthwith be taken before the court," but the Court stressed that the discharge was without prejudice to the government's authority to rearrest and commit the probationer in conformity with the statute (*id.* at 494). The Court also did not express any doubt that, if the government failed in the future to bring an arrested probationer before the court "forthwith," it could avoid the probationer's release by bringing him before the court, albeit in tardy fashion.

Moreover, in many of respondents' cited cases, the statute either specified that the consequence of a failure to meet a statutory deadline was a loss of power to proceed further,[4] or involved a statute of limitations, in which the consequence of failure to make a timely filing, dismissal of the action, is inherent in the nature of the deadline. See *Pierce County*, 476 U.S. at 261 (distinguishing *Mohasco*). The Coal Act, however, does not state anywhere that the Commissioner is divested of jurisdiction to act after September 30, 1993, or that any assignment made on or after October 1, 1993, shall be void. Nor does this case involve a time limit for a relatively simple matter, such as the time for filing a complaint

---

[4] See *Alabama* v. *Bozeman*, 533 U.S. 146, 153 (2001) (Interstate Agreement on Detainers specified that if a prisoner was returned to the sending state before trial, the indictment in the receiving state "shall not be of any further force" and must be dismissed) (emphasis omitted); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 24 (1989) (statute specified that, if litigant failed to follow pre-filing notification requirements, a lawsuit shall be "prohibited"); *United States* v. *Locke*, 471 U.S. 84, 89 (1985) (statute provided that failure to assert mining claim in timely fashion "shall be deemed conclusively to constitute an abandonment of the mining claim * * * by the owner"); *United States* v. *Boyle*, 469 U.S. 241, 243 (1985) (statute provided that, in the event of a failure to file a timely tax return, penalties shall be added); *Anderson* v. *Yungkau*, 329 U.S. 482, 484 (1947) (under Federal Rule of Civil Procedure 25(a) as then in effect, if substitution of proper parties was not made within two years after death of a party, "the action shall be dismissed").

Bellaire's reliance (Br. 18-19) on constitutional provisions requiring actions to be taken by certain dates is even further afield in ascertaining the meaning of an Act of Congress passed in 1992. In any event, those provisions make clear who has authority and who does not after the specified date. See, *e.g.*, U.S. Const. Amend. XII (providing that, if a President is to be chosen by the House of Representatives and the House does not choose a President by the appointed date, "then the Vice-President shall act as President"); Amend. XX ("The terms of the President and Vice President shall end at noon on the 20th day of January.").

that was at issue in cases such as *Mohasco*. Rather, this case involves a much "more substantial task" (*Pierce County*, 476 U.S. at 261)—the Commissioner's duty to sort through records concerning 65,000 retirees and to find the proper assigned operator for each of those individuals. "There is less reason, therefore, to believe that Congress intended such drastic consequences to follow from the [Commissioner's] failure" to complete that task by October 1, 1993. *Ibid.*[5]

2. Respondents' Argument That Congress Intended The Commissioner To Abandon All Attempts To Make Assignments As Of October 1, 1993, Is At Odds With The Basic Purposes Of The Coal Act

Nothing in the Coal Act suggests that Congress intended for the Commissioner to be divested on October 1, 1993, of all jurisdiction to make assignments, and that any assignments

---

[5] Contrary to Bellaire's contention (Br. 39-40), this case is not like *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941 (2002), in which the Court concluded that the congressional policy animating the Coal Act, strongly favoring assignments of miners to particular operators rather than the unassigned pool, could not overcome the plain language of the Act, which precluded assigning miners to direct successors in interest of signatory operators that had gone out of business. In this case, no language in the Coal Act divests the Commissioner of authority to make assignments on or after October 1, 1993 (including to a signatory operator that was a retired miner's actual employer), or provides that any such assignments shall be void.

Nor is there merit to Bellaire's argument (Br. 31) that this case is distinguishable from *Pierce County* and similar cases because the October 1, 1993, date was attached to the assignment authority delegated to the Commissioner by Congress in the Coal Act. In *Pierce County*, the 120-day period for agency action on complaints of mismanagement in job-training programs was attached to Congress's statutory delegation to the Secretary of Labor to act on such complaints, and yet the Court ruled that the Secretary had power to take action even after that 120-day period had run. See 476 U.S. at 259-266.

made after that date are void. To the contrary, an examination of the Coal Act as a whole clearly indicates that Congress did not intend to preclude the Commissioner from correctly assigning miners pursuant to the Coal Act's criteria, rather than irretrievably—and incorrectly—relegating them to the unassigned pool, as of October 1, 1993. The whole thrust of the Act was to assign retired miners, whenever possible, to coal operators that had employed them (or to "related persons" of such operators). Congress was particularly concerned with avoiding a replay of the last days of the old benefit trusts, in which the coal operators remaining within the collective bargaining system were forced to shoulder the health-care costs of miners who had worked for other, unrelated companies. Congress was also determined to establish the Combined Fund as a self-sufficient private entity and to avoid, to the extent possible, federal subsidization of retired miners' benefits.[6]

Attempting to downplay Congress's concern that each retired miner should be assigned to a particular operator, respondents argue (Peabody Br. 25-28; Bellaire Br. 13, 36-38) that Congress would have been satisfied with a "rough justice" approach under which most miners, more or less, would have been assigned to the proper operator, and the cost of other miners' benefits would have been shouldered collectively by all operators. But such justice would seem

---

[6] See 138 Cong. Rec. 34,001 (1992) (Sen. Wallop) ("[I]t is more appropriate to assign the cost of providing these benefits to ongoing business entities which have or had a relationship with the signatory employer, than to tax totally unrelated entities to fund the contractually promised benefits."); *id.* at 34,002 ("overriding purpose" of Act's assignment provisions is "to find and designate a specific obligor for as many beneficiaries in the Plans as possible"); *id.* at 34,032 (Sen. Rockefeller) ("[T]he basic funding mechanism of this legislation generally requires premium payments from those for whom the retirees worked. These are the responsible companies.").

very rough indeed to an operator required to pay for part of the health-care costs of a miner who had never worked for it (or any of its affiliates) even while that miner's actual employer remained in business. Indeed, a principal reason why the predecessor trusts stood on the brink of collapse when Congress enacted the Coal Act was that operators that had left the sector of the coal industry covered by the national collective-bargaining system had shifted the costs of their own retirees to the operators that remained in that system, and the remaining operators did not intend to accept that cost-shifting any longer.[7] The Coal Commission established by the Secretary of Labor to propose solutions to the looming crisis in retired miners' benefits likewise expressed the view that it was unfair to require coal operators to pay for the benefits of retirees who had worked for other operators that remained in business.[8] Thus, it is simply not the case, as respondents suggest, that Congress was interested only in ensuring that miners would have the cost of their benefits covered, and showed little concern about the party that was to be made responsible for those costs. To the contrary, Congress well understood that those two goals are interrelated, and that the future success of the Combined Fund depended crucially on the "pay for your own" principle,

---

[7] See *Coal Commission Report on Health Benefits of Retired Coal Miners: Hearing Before the Subcomm. on Medicare and Long-Term Care of the Senate Comm. on Finance*, 102d Cong., 1st Sess. 45, 48, 53 (1991) (testimony of Michael K. Reilly, Bituminous Coal Operators' Association) (*Coal Commission Report Hearing*).

[8] See *Coal Commission Report Hearing* 139 (testimony of Henry H. Perritt, Jr., Vice Chair of Coal Commission); see also *id.* at 214-215 (Coal Commission report, explaining that more than half of beneficiaries of predecessor trusts had been employed by coal operators that remained in business but had successfully "dumped" their retirees onto the trusts, and stating that "this situation is intolerable and must be stopped").

which diminished operators' incentives to go out of business rather than pay for other companies' retirees.

Respondents attempt to minimize the possibility that other operators might be forced to pay for their own retirees' health care benefits by pointing out that, until now, congressionally mandated transfers of interest earned on the Department of the Interior's Abandoned Mine Land Reclamation Fund (AML Fund) have covered deficits in the Combined Fund's operations. Congress did provide in the Coal Act for annual transfers, commencing in Fiscal Year 1996, of interest earned on the AML Fund to the Combined Fund. See 26 U.S.C. 9706(b); 30 U.S.C. 1232(h). Those anticipated transfers, however, have not been sufficient to prevent deficits in the Combined Fund.[9] Congress has twice provided short-term relief to the Combined Fund by authorizing additional transfers of interest from the AML Fund.[10] On the latter occasion, however, the Conference Committee made clear that, because the public fisc should not be responsible for the long-term solvency of the Combined Fund, it was "the final time the [Department of the] Interior will provide [additional] funds to the Combined Benefit Fund." See H.R. Conf. Rep. No. 914, 106th Cong., 2d Sess. 200 (2000).

Because the AML Fund is itself financed by a statutory fee on certain coal mining operations (see 30 U.S.C. 1232(a)), respondents suggest that transfers of interest from the

---

[9] See General Accounting Office, *Retired Coal Miners' Health Benefit Funds: Financial Challenges Continue* 1-2, 8 (Apr. 2002); General Accounting Office, *Analysis of the Administration's Proposal to Ensure Solvency of the United Mine Workers of America Combined Benefit Fund* 2-3 (Aug. 15, 2000).

[10] See Department of the Interior and Related Agencies Appropriations Act, 2001, Pub. L. No. 106-291, Tit. VII, § 701(a), 114 Stat. 1024; Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, Tit. V, § 501, 113 Stat. 1501A-214.

AML Fund to the Combined Fund amount merely to a reshuffling of funds among coal operators, and are not charges on the public account. See Peabody Br. 12, 30; Bellaire Br. 38. That is not an accurate description of the operation of the AML Fund or of the interest earned on that Fund. In the first place, the universe of companies that are subject to the AML fee—those *currently* engaged in coal mining (see 30 U.S.C. 1232(a))—is not the same as the universe of operators (and their related persons) that must pay for the health-care benefits of their *past* employees under the Coal Act. And the fact that the AML Fund is financed through government-imposed fees on coal mining does not mean that the proceeds of those fees are anything other than public monies once they are received by the government. See 30 U.S.C. 1231(a) and (b) (proceeds of AML fee are deposited in the Treasury); *Republic Nat'l Bank* v. *United States*, 506 U.S. 80, 93 (1993) (opinion of Rehnquist, C.J.) ("funds deposited in the Treasury" are "public money").

Moreover, contrary to respondents' intimations, AML Fund interest that is transferred to the Combined Fund is not a kind of cost-free "found money." As the Fourth Circuit pointed out in *Pardee* (269 F.3d at 438), the fundamental purpose of the AML Fund is to ameliorate the serious safety and health consequences of surface mining (see 30 U.S.C. 1231(c)(1)), and to the extent that interest on the AML Fund is diverted to other purposes (no matter how worthy), that interest is not available for the important public purpose of surface mining reclamation. Moreover, as the Congressional Research Service explained in a detailed analysis of the AML Fund prepared to assist Congress in its consideration of the proposal to provide for transfers from that Fund to the Combined Fund, the AML Fund is an entry on the books of the government's general fund, not a cash balance sitting in a bank account. See 30 U.S.C. 1231(a); 138 Cong. Rec. 34,006 (1992). Thus, in a period of federal budget deficits

such as the present, surplus collections from the AML Fund are borrowed by the general fund to cover general federal operations. See 30 U.S.C. 1231(e). To the extent that surplus is diminished or unavailable to the general fund, the government must *pro tanto* borrow from the public by issuing treasury debt and must pay interest on that debt. See 138 Cong. Rec. at 34,007. In a very real sense, then, money transferred from the AML Fund to the Combined Fund represents a cost to the general public.

More fundamentally, respondents simply disregard Congress's painstaking efforts to ensure that the responsibility for financing the health-care costs of retired coal miners would *not* end up in the lap of the government (or a group of different operators), but would fall to the most appropriate entity—the company that employed the miner. Once the President vetoed an earlier bill that would have financed retirees' benefits in part through taxes on coal production and imports, there was no consensus in Congress for any proposal that would have financed unassigned miners' benefits through additional fees or taxes.[11] Members of the Coal Commission with widely differing perspectives on the crisis in the predecessor trusts also agreed that Congress should not make "the public sector responsible for providing health care for a significant new group of retirees who historically have had a comprehensive private structure for financing and delivering health care."[12] But at bottom, respondents

---

[11] See *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 513-514 (1998) (opinion of O'Connor, J.); H.R. Conf. Rep. No. 461, 102d Cong., 2d Sess. 274-275 (1992) (prior bill); see 138 Cong. Rec. 34,001 (1992) (Sen. Wallop) (Congress did not intend to create a "new federal entitlement program"); *id.* at 34,032 (Sen. Rockefeller).

[12] *Coal Commission Report Hearing* 138 (Coal Commission Vice Chair Perritt); see *id.* at 237 (four members of Coal Commission, expressing opposition to "state-sponsored health care for those who are tied to one industry").

are attempting to shift the health-care costs of *their own* retired employees to the public (or to other operators). That is a result Congress did not countenance. It therefore would be antithetical to the structure, background, and purposes of the Coal Act to require that result simply because SSA was unable to make all of the necessary assignments before October 1, 1993. Cf. *Pierce County*, 476 U.S. at 262 ("the protection of the public fisc is a matter that is of interest to every citizen, and we have no evidence that Congress wanted to permit the Secretary's inaction to harm that interest").

3. The Coal Act Does Not Provide That The Consequence Of SSA's Failure To Complete The Assignment Process Before October 1, 1993, Is That All Remaining Miners Shall Be Deemed Unassigned

Although nothing in the Coal Act expressly renders void assignments made by the Commissioner on or after October 1, 1993, respondents argue that the invalidity of such assignments follows from the fact that any miner who cannot be assigned to a particular operator is treated as unassigned, and is therefore not the sole responsibility of any particular operator. See Peabody Br. 23-25; Bellaire Br. 20-21. Contrary to respondents' contention, however, the fact that a miner who had not yet been assigned to a particular operator (or related person) by October 1, 1993, was left in a pool of unassigned miners was simply the incidental effect of the ordinary operation of a process in which the assignment of each miner depended upon an affirmative determination by SSA of the particular operator (or related person) that was responsible for that miner under the Act. A miner's presence in the unassigned pool therefore did not reflect an affirmative determination by SSA that he must permanently remain unassigned, even if SSA later was able to identify the operator (or related person) that the Act renders responsible

for payment of his health care benefits. Thus, the fact that the Coal Act puts in place a back-up provision for the payment of benefits even to miners whom SSA is never able to assign to a particular operator does not mean that the Act divested SSA of all power to make assignments of those miners whom it *can* assign to particular operators on or after October 1, 1993, and that all such assignments therefore are void.

Respondents maintain that Congress was intent on permanently fixing all assignments of retirees to individual coal operators as of October 1, 1993, so that operators would know their obligations with certainty. See Peabody Br. 29-30; Bellaire Br. 25-27. But nothing in the text, purposes, or background of the Coal Act remotely suggests that that date was a statute of repose intended as a special benefit *for* coal operators. To the contrary, Section 9706(a) was intended to provide for the expeditious collection of premiums *from* coal operators. See pp. 5-6, *supra*.[13]

---

[13] For that reason, Bellaire errs in arguing (Br. 28-31) that, when a statute requires an agency to perform a function by a particular date, the agency should be allowed to undertake that task after that date only when some other remedy would be available to compel the agency to complete its obligations in a timely fashion, such as an action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, to compel agency action unlawfully withheld. In *Pierce County*, the Court observed that, if the Secretary of Labor failed to observe the 120-day time limit for decisions on complaints about irregularities in federally funded job-training programs, the complainant might be able to bring suit under the APA to compel the Secretary to take action, and the grant recipient might also be able to do so if the 120-day limit was intended to protect its interests as well. See 476 U.S. at 260 & n.7. Although a coal operator might not have been able to bring an APA action to compel SSA to complete the Coal Act assignment process before (or even shortly after) October 1, 1993, that only underscores the point that the Coal Act did not confer on a coal operator a statutory right to agency action before that date. In other words, the Coal Act did not create any special statutory

There is ample evidence, by contrast, that Congress was greatly concerned about ensuring that retirees were properly assigned to the operators for which they worked (or a related person), see pp. 11-12, *supra*, and that Congress thought that concern more weighty than "the coal operators' interest, if any, in finalizing assignments by October 1, 1993." *Pardee*, 269 F.3d at 434. Congress provided, for example, that, if the administrative review process revealed that the Commissioner had made an erroneous assignment of a miner to a particular operator, the Commissioner should review that miner's record for possible reassignment to another operator, rather than deem that miner unassigned— which would have been more consistent with respondents' statute of repose theory. See 26 U.S.C. 9706(f)(3)(A)(ii).

In addition, as Peabody acknowledges (Br. 36 n.20), if an assignment of a miner to a particular operator is invalidated on *judicial* review, SSA may reassign that miner to another operator rather than deem him unassigned—even though the Coal Act provides no express authority for SSA to make such a reassignment, and even though such judicial decisions might be rendered many years after the initial assignments

---

interest in repose for the benefit of coal operators that would be judicially enforceable.

Moreover, this Court has never ruled that the existence of an alternative remedy such as an APA action is a *prerequisite* for a determination that an agency has jurisdiction to act even when it has failed to meet an obligation to act within a time specified in a statute. Indeed, in *James Daniel Good*, the Court ruled that the United States had authority to bring a forfeiture action even when the government failed to meet timing requirements other than the statute of limitations, even though there was no evident mechanism for the judiciary to compel government compliance with those timing requirements. See 510 U.S. at 64 (noting that Congress had left to agency discretion how to discipline officials for noncompliance).

were made.[14] So too here, SSA may assign a miner to a particular operator according to the Coal Act's criteria if it was unable to do so before October 1, 1993. The overarching point is that Congress intended SSA to ensure, if possible, that a miner was *correctly* assigned according to the detailed criteria set forth at 26 U.S.C. 9706(a), and not *incorrectly*—and permanently—treated as unassigned. Cf. *Regions Hosp.*, 522 U.S. at 460 (declining to construe Medicare Act to require "[e]rror perpetuation" from base year throughout all subsequent years); *id.* at 458-459 ("it is hard to believe that Congress intended that misclassified and nonallowable costs [would] continue to be recognized * * * indefinitely") (internal quotation marks omitted).

Peabody suggests (Br. 36 n.20) that Congress did not expressly provide SSA with authority to reassign miners to particular operators in response to judicial decisions invalidating SSA's initial assignments because Congress did not expect that the Commissioner would make erroneous assignments. That point does not distinguish this case. Clearly, Congress did not *expect*, when it enacted the Coal Act, that the Commissioner would fail to make assignments before October 1, 1993. Neither, however, did Congress bar the Commissioner from making a proper assignment after that date given the unfortunate circumstance that SSA was unable to make some correct assignments before that date —just as Congress did not bar SSA from making new assignments of miners to particular operators in the unfortunate

---

[14] Indeed, SSA is currently making such reassignments in response to this Court's decisions invalidating assignments in *Eastern Enterprises* and *Sigmon Coal*. See *Apogee Coal Co.* v. *Holland*, No. 01-13691, 2002 WL 1491641, at *5 (11th Cir. July 12, 2002) (observing that SSA may make reassignments in response to judicial decisions invalidating assignments); *Wheeling-Pittsburgh Steel Corp.* v. *Barnhart*, No. 5:99CV60 (N.D. W.Va. Mar. 29, 2002), slip op. 32-33 (upholding SSA's authority to make such reassignments).

event that SSA's initial assignments of those miners were overturned on judicial review. In both cases, accuracy, rather than definitive agency action before October 1, 1993, was Congress's primary concern. The issue is not whether Congress expected that SSA might make assignments that did not conform to the statute, but rather whether Congress intended to require SSA to treat miners who had not been assigned in conformity with the statute as permanently *unassigned*. As we have explained, Congress did not.[15]

* * * * *

For the foregoing reasons, as well as those set forth in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JULY 2002

---

[15] There is no merit to Bellaire's alarmist assertion that our submission will allow SSA to conduct an "[i]nterminable assignment process" (Bellaire Br. 25). First, some initial assignments were made to operators within a few months after October 1, 1993, simply because SSA could not complete the assignment process before that date. Second, additional assignments were made to operators at later dates based on information that SSA obtained in the process of reviewing administrative appeals of other assignments. See Gov't Br. 11. That process has also come to an end, because operators were required to initiate the process of administrative review within 30 days of receiving their assignments. 26 U.S.C. 9706(f)(1).